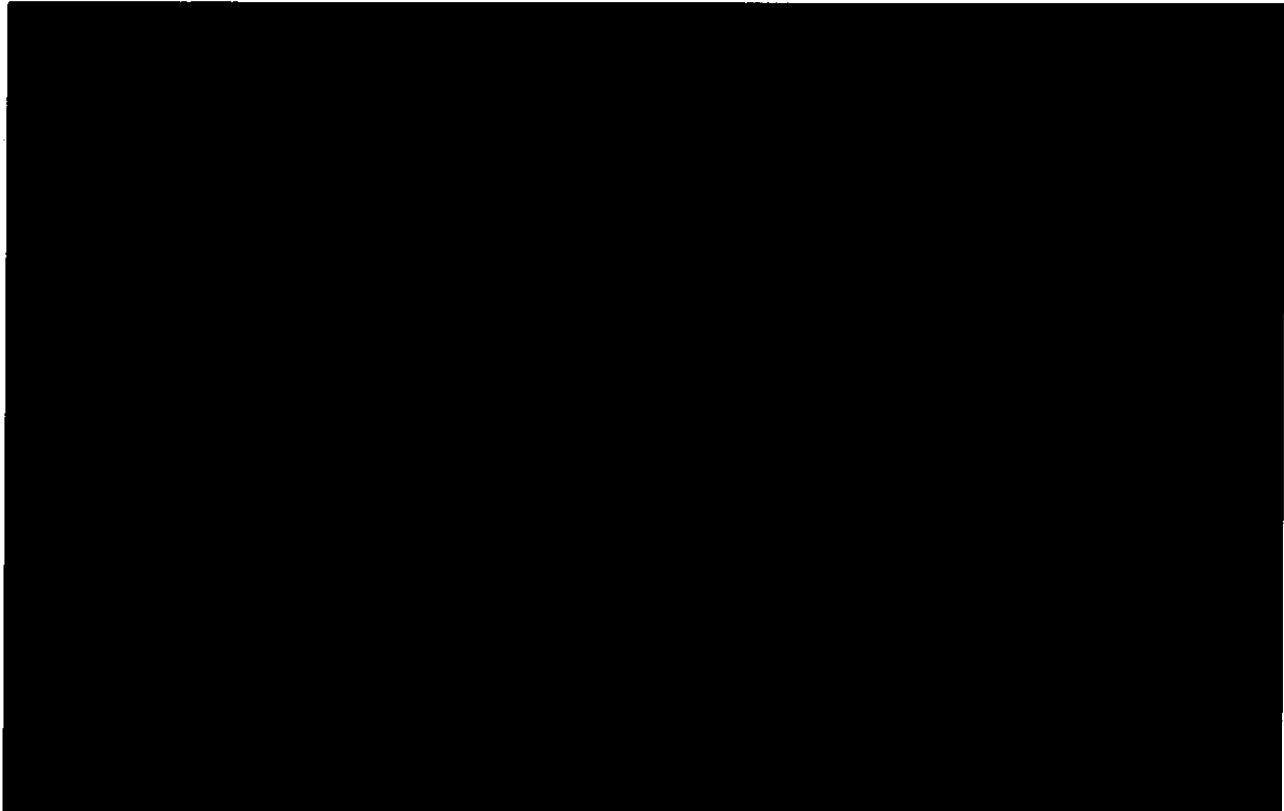


~~TOP SECRET//COMINT//NOFORN~~

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.



**BRIEFING ORDER**

On April 20, 2011, the United States filed with this Court the "Government's Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications" for DNI/AG 702(g) Certifications [REDACTED]

[REDACTED]

~~TOP SECRET//COMINT//NOFORN~~

~~TOP SECRET//COMINT//NOFORN~~

[REDACTED]

[REDACTED] On May 2, 2011, the government filed with this Court a letter pursuant to FISC Rule 13(a) titled "Clarification of National Security Agency's Upstream Collection Pursuant to Section 702 of FISA" (May 2 Letter).

The May 2 Letter describes an aspect of the National Security Agency's (NSA) upstream collection through which [REDACTED] is acquired "if [REDACTED] contains [REDACTED] that NSA has tasked for acquisition under Section 702." May 2 Letter at 2. Such [REDACTED] acquisitions may contain data that is wholly unrelated to the tasked selector, [REDACTED]

[REDACTED] or about the targeted facility. See id. The letter further acknowledges that NSA is "[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] information in a single Internet communication" and that NSA acquires such "single Internet communications" in their entirety whenever a Section 702 tasked selector is contained in them. Id. at 3. Finally, the May 2 Letter notes that NSA uses Internet Protocol (IP) filters and [REDACTED] to ensure that "the person from who it seeks to obtain foreign intelligence information is located overseas," but suggests that the government may lack confidence that such measures are effective in the context of [REDACTED]

[REDACTED] See id.

This is a matter of serious concern to this Court, as the acquisitions described in the May 2 Letter may exceed the scope of collection previously disclosed by the government and

~~TOP SECRET//COMINT//NOFORN~~

~~TOP SECRET//COMINT//NOFORN~~

approved by the Court, and may, in part, fall outside the scope of Section 702. Based upon its review of the May 2 Letter and upon the substance of preliminary discussions between the Court staff and the government, the Court has identified several questions that merit briefing.

Accordingly, the government is hereby directed to file a written memorandum with any necessary supporting documentation addressing the following questions:

1. The government's May 2 Letter can be read to take the position that [REDACTED] are communications authorized for collection under the Section 702 Certifications that have previously been approved by the Court.
  - a. For how long has NSA been acquiring [REDACTED] through its upstream collection?
  - b. According to the May 2 Letter, [REDACTED]  
[REDACTED] They also may include discrete communications as to which all communicants are within the United States. Please explain how the acquisition of such transmissions:
    - i. comports with the government's representations to the Court regarding the scope of upstream collection under Section 702 and the approvals granted by the Court in reliance upon those representations in Dockets 702(i) 08-01, [REDACTED] (see, e.g., Docket No. 702(i)-08-01, Aug. 27, 2008 Hearing Transcript at 19-26, 40-41 and Sept. 4, 2008 Memorandum Opinion at 15-20, 38);
    - ii. meets the requirements of Section 702, including, but not limited to, the requirement that targeting procedures must be reasonably designed to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States"; and,
    - iii. is consistent with the Fourth Amendment.
2. The May 2 Letter describes [REDACTED] as "single Internet communication[s]" or "individual Internet communication[s]." May 2 Letter at 3.
  - a. Please identify all "single Internet communications," [REDACTED] that might be acquired by NSA through the targeting of a single tasked selector.
  - b. Please identify and fully describe each category of information that might be contained in each such "single Internet communication."

~~TOP SECRET//COMINT//NOFORN~~



~~TOP SECRET//COMINT//NOFORN~~

- c. The May 2 Letter states that NSA is not presently capable of “separating out individual pieces of information” contained within an [REDACTED]. May 2 Letter at 3. Please explain why and state whether it would be feasible for NSA to implement such capability, either at the time of acquisition or thereafter.
- d. Can [REDACTED] be identified as distinct from other, discrete communications between users, either at the time of acquisition or thereafter? If so, can NSA filter its Section 702 collection on this basis?
3. The May 2 Letter notes that NSA uses Internet Protocol (IP) filtering and [REDACTED] to prevent the intentional acquisition of communications as to which the sender and all known recipients are inside the United States. May 2 Letter at 3.
- a. Please describe how NSA applies IP filtering in the context of [REDACTED]
- i. [REDACTED]
- ii. [REDACTED]
- b. In the collection of “to/from” communications, are the communicants always the individual users of particular facilities [REDACTED], or does NSA sometimes consider [REDACTED]? Please explain.
4. How, in terms of numbers and volume, does NSA’s collection [REDACTED] under Section 702 compare with the collection of discrete Internet communications (such as e-mail messages) between or among individual users?
5. Given that some of the information acquired through upstream collection is likely to constitute “electronic surveillance” as defined in 50 U.S.C. § 1801(f)(2) that has not been approved by this Court, how does the continued acquisition of, or the further use or dissemination of, such information comport with the restrictions of 50 U.S.C. § 1809(a)(1) and (a)(2)?
6. Please provide an update regarding the [REDACTED] overcollection incidents described in the government’s letter to the Court dated April 19, 2011.
7. Are there any other issues or additional information that should be brought to the Court’s

~~TOP SECRET//COMINT//NOFORN~~


~~TOP SECRET//COMINT//NOFORN~~

attention while it is considering the certifications and amendments filed in the above-captioned dockets?

In order to ensure that the Court has sufficient time to consider the information provided by the government, to seek whatever additional information from the government that might be needed, and to conduct the review and analysis that is required by Section 702, the government's memorandum shall be submitted no later than 5 p.m. on June 1, 2011.

IT IS SO ORDERED.

ENTERED this [REDACTED] day of May 2011.

  
\_\_\_\_\_  
**JOHN D. BATES**  
Judge, United States Foreign  
Intelligence Surveillance Court

I, [REDACTED]  
FISC, certify that this document  
is a true and correct copy of  
the original [REDACTED]

~~TOP SECRET//COMINT//NOFORN~~

Page 5

b(6) and b(7)(C)